Volume 85
Issue 3 *Dickinson Law Review - Volume 85, 1980-1981*

3-1-1981

The Automobile Warranty Crisis: Would Enactment of Proposed Amendments to the Magnuson-Moss Warranty Act Provide a Panacea for the Consumer?

Barbera E. Sanson

The Automobile Warranty Crisis: Would Enactment of Proposed Amendments to the Magnuson-Moss Warranty Act Provide a Panacea For the Consumer?

Barbara E. Sanson*

I. Introduction

Congress passed the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act[1] in 1974[2] to facilitate understanding of consumer product warranties, to improve competition in the marketing of consumer products, to prevent deception, and to encourage informal settlement of warranty-related disputes.[3] Theoretically, the statute, which delineates with specificity the duties that suppliers assume when *voluntarily* offering written warranties on consumer products,[4] affords greater protection to consumers. For

* A.B., Bryn Mawr College 1977; J.D., Dickinson School of Law 1980. Law Clerk for the Honorable Maxwell E. Davison, Court of Common Pleas, Lehigh County, Pennsylvania.

1. Pub. L. No. 93-637, 88 Stat. 2183 (1975). Title I of the Act deals with consumer warranties. 15 U.S.C. §§ 2301-2312 (1976). Title II encompasses the increased jurisdiction and powers of the Federal Trade Commission. 15 U.S.C. §§ 44-46, 49-50, and 56-58 (1979 Supp.).

For informative studies of Title I of the Act see Brickey, *The Magnuson-Moss Act—An Analysis of the Efficacy of Federal Warranty Regulation as a Consumer Production Tool,* 18 SANTA CLARA L. REV. 73 (1978); Denicola, *The Magnuson-Moss Warranty Act: Making Consumer Product Warranty a Federal Case,* 44 FORDHAM L. REV. 273 (1975); Magnuson, *Fair Disclosure in the Marketplace of Warranty Promises—Truth in Warranties for Consumers,* 8 U.C.C. L.J. 117 (1975) [hereinafter cited as *Fair Disclosure*]; Roberts, *The Magnuson-Moss Federal Warranty Act and Failure of Its Essential Purpose, Uniform Commercial Code* 2-719(2), 33 BUS. LAW. 1845 (1978); Schroeder, *Private Actions Under the Magnuson-Moss Warranty Act*, 66 CAL. L. REV. 1 (1978); Smith, *The Magnuson-Moss Warranty Act: Turning the Tables on Caveat Emptor*, 13 CAL. W. L. REV. 391 (1977) [hereinafter cited as *Caveat Emptor*]; Strasser, *Magnuson-Moss Warranty: An Overview and Comparison With U.C.C. Coverage, Disclaimers, and Remedies in Consumer Warranties,* 27 MERCER L. REV. 111 (1976); Note, *Consumer Product Warranties Under the Magnuson-Moss Act and the Uniform Commercial Code,* 62 CORNELL L. REV. 738 (1977).

2. On December 19, 1974 S. 356 cleared Congress. President Ford signed the bill into law on January 4, 1975. CQ ALMANAC, 93d Cong., 2d Sess. 327 (1974).

3. 119 CONG. REC. 972 (1973) (remarks of Sen. Moss). *See also* H.R. REP. NO. 1107, 93d Cong., 2d Sess. 23 *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702.

4. Manufacturers need not supply written warranties on their products. When they vol-

example, by mandating that the terms and conditions of the two permitted types of wr:itten warranties be disclosed in clear language, the Act attempts to promote consumer awareness and selectivity. Practically, the competition that ensues from developing consumer sophistication encourages manufacturers of home appliances to proffer "full" rather than "limited" warranties.[5]

In the automobile industry, however, the Act has achieved no comparable success, largely because each of the "Big Three"[6] automobile manufacturers offers only "limited" warranties on its products.[7] Statistically, fewer than two percent of all new automobiles are currently sold with "full" warranties.[8] As a result, automobile purchasers are generally deprived of the broad range of protection afforded by the Act, a deprivation underscored by the fact that the automobile is recognized as one of the largest single purchases made by consumers.[9]

Further weakening the position of automobile purchasers, the proffer by manufacturers of "limited" warranties may also foreclose significant remedies prescribed by each state's commercial code. Since "limited" warranties often purport to provide exclusive remedies, purchasers could be precluded under subsection 2-719(2) of the Uniform Commercial Code (U.C.C.) from seeking revocation and

---

untarily provide such written guarantees, however, the warranties must conform to the mandates of the federal Act. *See* note 71 and accompanying text *infra.*

5. Before presenting a bill to amend current warranty laws, Senator Metzenbaum (Ohio) noted: "A significant number of companies, including many of the manufacturers of such large and expensive products as home applicances currently offer such comprehensive protection to the consumer. In fact, full warranties are the rule rather than the exception in the major home appliance industry." 125 CONG. REC. S.11691 (daily ed. Aug. 3, 1979) (remarks of Sen. Metzenbaum). *But see* Note, *Empirical Study of the Magnuson-Moss Warranty Act*, 31 STAN. L. REV. 1117 (1979). For a detailed explanation of the distinction between "full" and "limited" warranties, see § III C *infra*.

6. The General Motors Corp., the Ford Motor Co., and the Chrysler Corp. are commonly termed the "Big Three" automobile manufacturers.

7. The American Motors Corp., however, offers "full" warranties on its automobiles. 125 CONG. REC. S.11691 (daily ed. Aug. 3, 1979) (remarks of Sen. Metzenbaum).

8. Conversely, more than 98% of all new automobiles are sold with only "limited" warranties. *Id.*

9. *Id.* Rocketing car prices, which exacerbate the poor warranty protection afforded consumers, prompted Sen. Metzenbaum (Ohio) to write:

> In hearings last week before the House Subcommittee on Consumer Protection, the Federal Trade Commission and several consumer and public interest groups testified in support of similar legislation. In his testimony, FTC Chairman Michael Pertschuk noted that increasingly higher prices for new cars 'make the consequences of owning a lemon even worse for the unlucky few.' The lemon owner, forced to sell a car earlier than usual, can lose several thousand dollars and, 'the trade-in inevitably becomes a used lemon to the next buyer.'

Dear Colleague Letter, Sen. Metzenbaum For Senate Comm. on Energy and Natural Resources, Washington, D.C. (July 16, 1979) (on file in office of Dick. L. Rev.).

Similarly, in his remarks preceding House subcommittee hearings, Congressman Eckhardt (Tex.) specifically noted that expenditures for private transportation equal those for food in the urban working family's budget. The 19.3% income outlay for transportation occurs despite disproportionately large increases in food prices and other basic necessities. AUTO REPAIR: HEARINGS BEFORE THE SUBCOMM. ON CONSUMER PROTECTION AND FINANCE OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95th Cong., 2d Sess. 2 (1978).

damages.[10] Additionally, judicial uncertainty over the proper application of U.C.C. subsection 2-719(3) could bar purchasers from recovering consequential property damages.[11]

The repeated refusals by automobile manufacturers to provide "full" warranties are exacerbated by the documented failure of automobile manufacturers to design adequately and repair their products. Preliminary results of a Federal Trade Commission-sponsored survey of 1976 vehicles, for example, indicate that nearly thirty percent of all new automobiles are sold with defects, compared with seven percent of warranted consumer products overall.[12] In addition, forty percent of motor-vehicle problems require repeated visits to a dealer, while thirty percent take longer than a month to correct.[13] Upon final resolution of attendant automobile-reparation disputes, twenty-five percent of purchasers remain dissatisfied but enjoy no further remedy.[14] In support of these startling figures, the Better Business Bureau's 1978 statistical summary demonstrates that nearly sixty percent of automobile-related complaints concern new vehicles still under warranty.[15]

Clearly, the present automobile-warranty crisis requires immediate consideration and rectification. This article examines the initial passage of the Magnuson-Moss Warranty Act as an attempt to protect the consumer and discusses its subsequent failure in the automobile industry. Additionally, proposed amendments to the Act are analyzed in the context of the present warranty crisis. The potential for correcting these abuses under U.C.C. section 2-719 is also considered. Finally, in an attempt to present a viable solution to the crisis, legislative and judicial measures are suggested.

II. The Warranty Situation Prior to the Enactment of Federal Legislation

A. Protection Available to Consumers Under the U.C.C.

Prior to the enactment of federal warranty legislation, each

10. *See* § V *infra*. *See also* note 44 and accompanying text *infra*.

11. *See* § V *infra*. *See also* note 45 and accompanying text *infra*.

12. STAFF OF HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96th Cong., 1st Sess., REPORT ON AUTOMOBILE REPAIRS 29 (Comm. Print 1979) [hereinafter cited as STAFF OF HOUSE COMM.].

13. *Id.*

14. *Id.* Notably, in a 1968 study, the FTC determined that "in some instances manufacturers have not lived up to their unstated but no less real obligations under their guarantees. . . . They have failed to discard a servicing dealer or independent servicing agency which does not provide acceptable warranty service. They have failed to give more than cavalier treatment to consumer appeals for assistance when the retailer has refused to honor the guarantee." H.R. REP. No. 1107, 93d Cong., 2d Sess. 23-23 *reprinted in* [1974] U.S. CONG. & AD. NEWS 7702, 7709 [hereinafter cited as H.R. REP.]. Clearly, the enactment of federal warranty legislation has insufficiently aided buyers, since problems currently faced by automobile consumers parallel difficulties apparent in 1968.

15. STAFF OF HOUSE COMM., *supra* note 12, at 29.

state's commercial code afforded consumers some legal redress.[16] Because the sale of consumer products constituted transactions in goods,[17] such sales clearly fell within the ambit of U.C.C. Article 2. As a result, the various U.C.C. provisions dealing with warranties, buyers' remedies, and disclaimers of liability governed the rights of aggrieved consumers. Since these provisions still often determine rights and remedies in litigation over "limited" warranties,[18] a cursory examination of them will be helpful.

1. Types of Warranties Available. —Express warranties are created under section 2-313[19] of the U.C.C. by written or oral[20] statements that both relate to the goods and become part of the basis of the bargain.[21] An affirmation of fact, a promise, a description, a sample or a model may provide the requisite statement.[22] Furthermore, a seller need neither intend to create a warranty nor use artful terms such as "warranty" or "guarantee;" mere advertising or utilization of generic titles can constitute an express warranty.[23]

Implied warranties of merchantability arise under section 2-314 whenever goods are sold by a merchant who deals in goods of that kind.[24] Only goods fit for the ordinary purposes for which they are

16. *See generally* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE (1972) [hereinafter cited as WHITE & SUMMERS].

17. *See* U.C.C. §§ 2-105(1) and 2-102.

18. *See* Barr v. General Motors Corp., 80 F.R.D. 136 (S.D. Ohio 1978); Novosel v. Northway Motor Car Corp., 460 F. Supp. 541 (N.D.N.Y. 1978); Clark v. Ford Motor Co., 46 Or. App. 521, 524 n.2, 612 P.2d 316, 318 n.2 (1980). *See also* Pratt v. Winnebago Ind., Inc. v. General Motors Corp., 463 F. Supp. 709 (W.D. Pa. 1979).

19. U.C.C. § 2-313 provides:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

20. *See* Butcher v. Garret-Enumclaw Co., 20 Wash. App. 361, 581 P.2d 1352 (1978).

21. *See, e.g.,* Durbano Metals, Inc. v. A & K R.R. Materials, Inc., __ Utah __, 574 P.2d 1159 (1978).

22. *See, e.g.,* Falcon Tankers, Inc. v. Litton Sys., Inc., 380 A.2d 569 (Del. Super. 1977); Drier v. Perfection, Inc., __ S.D. __, 259 N.W.2d 496 (1977).

23. *See, e.g.,* Scheuler v. Aamco Transmissions, Inc., 1 Kan. App. 2d 525, 571 P.2d 48 (1977).

24. U.C.C. § 2-314 provides:

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with

generally used[25] and conforming to any promises or affirmations of fact made on the container or label are deemed merchantable.[26] Basically, the actual or presumed expertise of the merchant, the buyer's reliance on the seller's judgment, the consumer's lack of bargaining position to insist upon express warranties, and the purchaser's general inability to inspect goods for defects justify the imposition of implied warranties.[27]

Implied warranties of fitness for a particular purpose are recognized under section 2-315.[28] When any seller[29] at the time of contracting has reason to know[30] that goods are required for a particular purpose and also that the buyer is relying on his skill or judgment to furnish suitable goods, an implied warranty exists. Notably, this warranty may arise in conjunction with the implied warranty of merchantability.[31]

2. Purchaser's Remedies for Breach of Warranty.—A purchaser[32] may revoke his acceptance[33] when a defect, of which he was justifiably unaware or which he reasonably assumed would be cured after acceptance, substantially impairs the value of the goods to him. Revocation must occur within a reasonable time, however, and before the goods deteriorate. Upon justifiable revocation of accept-

---

respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

25. Bosway Tube & Steel Corp. v. McKay Machine Co., 65 Mich. App. 426, 237 N.W.2d 488 (1975); Waddell v. American Breeders Service, Inc., 161 Mont. 221, 505 P.2d 417 (1973).

26. *See* Comment, *Consumer Warranty Law in California Under the Commercial Code and the Song-Beverly and Magnuson-Moss Warranty Acts,* 26 U.C.L.A. L. REV. 583, 600 (1979).

27. *Id.* at 599.

28. U.C.C. § 2-315 provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

29. By mentioning "seller" rather than "merchant," U.C.C. § 2-315 goes beyond the scope of § 2-314.

30. *See, e.g.,* Sass v. Spradlin, 66 Ill. App. 3d 976, 23 Ill. Dec. 670, 384 N.E.2d 464 (1978); Valley Iron & Steel Co. v. Thorin, 278 Or. 103, 562 P.2d 1212 (1977).

31. *See* U.C.C. § 2-315, Comment 2.

32. No distinction is meant in this article between buyer and purchaser.

33. *See* U.C.C. § 2-608.

ance, a purchaser may cancel the contract, recover his purchase price, and "cover."[34] Alternatively, a purchaser may revoke and recover damages for non-delivery; such tripartite damages encompass the amount already paid, the difference between the market price at the time of breach and the contract price, and any incidental or consequential damages.[35] Under either option for revocation, a purchaser retains a security interest in the goods.[36]

Conversely, were a buyer to retain non-conforming goods rather than revoke his acceptance, he could sue for breach of warranty. Damages would embrace any incidental or consequential losses in addition to the difference between the value of the goods accepted and the goods warranted.[37] Significantly, no exemplary damages or attorneys fees are available in any suit invoking the U.C.C.[38]

3. Disclaimers and Limitations of Remedy.—Sellers, however, may reduce their potential liability for defective products under two distinct provisions. Sellers can insulate themselves from liability by disclaiming, modifying or excluding warranties entirely under section 2-316 and concurrently limiting the types of remedies available to buyers under section 2-719.

Even though section 2-316 disallows negations or limitations of liability that are inconsistent with any express warranties provided,[39] implied warranties enjoy no similar statutory shield. Mentioning merchantability and, in the case of a writing, displaying the disclaimer conspicuously, sufficiently exclude an implied warranty of merchantability according to subsection 2-316(2).[40] Similarly, conspicuously excluding or modifying an implied warranty of fitness for a particular purpose in a writing suffices to disclaim the second type of implied warranty. Utilization of expressions such as "with all faults" and "as is" also normally eradicates warranty liability.[41]

---

34. "Covering" allows the buyer to procure substitute goods and recover damages amounting to the difference between the contract and cover prices. *See* U.C.C. § 2-712(2).

35. *See* U.C.C. § 2-713.

36. *See* U.C.C. § 2-711(3).

37. *See* U.C.C. § 2-714(2)(3).

38. *See* note 82 and accompanying text *infra.*

39. U.C.C. § 2-316 provides in pertinent part:

> (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

40. U.C.C. § 2-316 provides in pertinent part:

> (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

41. *See* U.C.C. § 2-316(3)(a).

Not only may warrantors exclude implied warranties to reduce their potential liability, but under subsection 2-719(1)[42] they may contemporaneously limit the remedies available to purchasers upon breach of warranty. For example, a seller could specify that repair or replacement of the non-conforming parts represents the buyer's sole recourse. Were this remedy expressly agreed to be exclusive, a purchaser would merely be promised an opportunity to receive a defect-free product eventually and the seller would only be obligated to keep trying to deliver the desired product.[43]

Notwithstanding this statutory endorsement of disclaimers and limitations of remedy, the U.C.C. affords minimal protection to consumers, when circumstances cause an exclusive or a limited remedy to "fail of its essential purpose." If an exclusive remedy fails of its essential purpose, all U.C.C. remedies become available under subsection 2-719(2).[44] Furthermore, no consequential damages may be limited or excluded if so doing appears unconscionable.[45] High litigation costs combined with inconsistent application of the section 2-719 remedies minimize the protection afforded. Currently, not only do various courts evaluate failure of an essential purpose differently, but they disagree on whether consequential damages may properly be awarded for such failure.

B. The Documented Need for Greater Consumer Protection

Basically, because state commercial codes permitted broad disclaimers of warranty liability and provided consumers with uncertain remedies under section 2-719, warranties remained noticeably inadequate during the 1960's and early 1970's. In particular, express warranties were carefully drafted to limit or eliminate implied warranty protection through the artful use of permitted disclaimers.[46] "Taking away in fine print what the bold print ostensibly gave" be-

---

42. U.C.C. § 2-719(1) provides in pertinent part:

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

43. *See* Mueller, *Contracts of Frustration,* 78 YALE L.J. 576, 581-82 (1969).

44. U.C.C. § 2-719(2) provides in pertinent part:

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

45. U.C.C. § 2-719(3) provides in pertinent part:

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

46. *See Caveat Emptor, supra* note 1.

came standard practice, largely because buyers initially failed to comprehend fully the implications of warranty disclaimers.[47] Only later, when purchasers eventually discerned that their warranties were virtually worthless, did they begin to vocalize their displeasure.

Notably, by 1965, the large number of consumer complaints lodged against automobile warrantors encouraged the Federal Trade Commission (FTC) to investigate the efficacy of automobile warranties. The Commission's staff report, published in 1968, read as follows:

> 1. Performance of manufacturers and dealers under the warranty has not achieved the levels implied by the warranty.
>
> 2. Failure to perform up to warranted standards has been encountered in the manufacture and the preparation of cars under the warranty.
>
> 3. An excessive amount of service under the warranty does not meet the standards of consumer acceptability.[48]

A second report issued by the Commission in 1970, reiterated a concern for the growing dichotomy between warranty promises and warranty performance. This study concluded by advocating that federal legislation resolve warranty and repair problems.[49]

In response to the mounting criticism of manufacturers and retailers the federal government sponsored similar studies on consumer product warranties. Because so many warrantors allegedly failed to honor their warranties, President Johnson commissioned a Task Force on Appliance Warranties and Service in his February 6, 1968 Presidential message on consumer matters.[50] Besides examining the basic problem, this task force intended to encourage voluntary improvement of warranties. Eleven months after its formation, the President's Task Force submitted a report containing three illuminating findings. First, the substantive terms of the 200 warranties analyzed appeared ambiguous. Second, all of the fifty manufacturers selected for scrutiny attempted to disclaim liability for implied warranties. Last, since no viable method existed for persuading manufacturers to provide meaningful warranties voluntarily, federal legislation appeared necessary.[51]

Appreciating the need for congressional action, politicians began to propose bills for warranty regulation in the late 1960's. Initial attempts at enacting such legislation, however, were unsuccessful. Both the Ninety-First and Ninety-Second Congresses entertained considerable testimony in support of two bills but adjourned without

47. H.R. REP. *supra* note 14, at 7706.
48. *Id.* at 7708-09.
49. *See Caveat Emptor, supra* note 1, at 393.
50. *Id.*
51. *Fair Disclosure*, supra note 1, at 119.

taking action.[52]

Finally in 1974, the Ninety-Third Congress responded to consumer needs by passing the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act.[53] Significantly, in September of 1974, while Senate and House members were still discussing the feasibility of modifying the proposed warranty legislation, Congressman Moss released the results of a committee survey of 200 warranties.[54] As well as emphasizing the general deficiencies inherent in the warranties studied, the report noted that warranties covering products manufactured in 1974 continued to be riddled with ambiguities and loopholes. By December of 1974, the Magnuson-Moss Warranty Act cleared Congress. President Ford signed the bill into law on January 4, 1975.

III. The Magnuson-Moss Warranty Act's Attempt to Protect Consumers

The Magnuson-Moss Warranty Act attempts to protect consumers both by setting minimum federal standards for consumer product warranties and by empowering the FTC to promulgate and enforce additional regulations for written warranties. Furthermore, rather than preempting state warranty laws, the Act complements them. Focusing on the statutory provisions, Title I[55] defines the scope of the enactment and details various disclosure requirements, warranty standards, and remedies available to consumers.

A. Scope of the Act

Generally, manufacturers need furnish no warranties under the Act.[56] Only when written warranties are *voluntarily* offered to consumers purchasing consumer products do the mandates of the Act apply.[57] The definitional section of the Act, FTC regulations, and judicial pronouncements delineate the scope of the legislation more specifically.

1. Written Warranties.—Two types of writings constitute "writings warranties" under section 2301(6). First, the statutory definition embraces any written affirmation of fact or written promise made by the supplier in connection with the sale of the consumer

52. *Caveat Emptor, supra* note 1.

53. Pub. L. No. 93-637, 88 Stat. 2183 (1975). Title I appears at 15 U.S.C. §§ 2301-2312 (1976); Title II appears at 15 U.S.C.§§ 44-46, 49-50, and 56-58 (1977 Supp.).

54. CQ ALMANAC, 93d Cong., 2d Sess. 331 (1974).

55. 15 U.S.C. §§ 2301-2312 (1976).

56. The Act applies only to a "warrantor warranting a consumer product to a consumer by means of a written warranty." *Id.* § 2302(a),(b)(1)(B)(2).

57. Warranties for articles manufactured prior to July 4, 1975 remain wholly unaffected by the enactment. *See* notes 92 and 93 and accompanying text *infra.*

product, which relates to the material or workmanship of the product and promises either that the product is defect-free or that it will meet a certain level of performance over a specified period of time.[58] Second, any undertaking in writing by a supplier to refund, repair, replace or otherwise remedy a specified defect also serves as a "written warranty." With either type of writing, the affirmation or undertaking must form part of the basis of the bargain between the supplier and buyer for purposes other than mere resale of the product.[59]

2. Consumer Product.—Section 2301(1) defines "consumer product" as any tangible personal property[60] that is both distributed in commerce and normally used for personal, family or household purposes. Whether use of the product is "not uncommon" determines status, with ambiguities resolved in favor of coverage.[61] An FTC regulation similarly defines "consumer product" when applied to rules concerning disclosure of warranty terms and pre-sale availability of warranties.[62]

3. Consumer.—According to section 2301(3), a "consumer" may be a buyer or transferee of a consumer product or, alternatively, a person entitled by warranty language or state law to enforce a warranty.[63] While the definition excludes a purchaser buying solely for resale purposes, a corporation purchasing products normally used for personal, family or household purposes enjoys consumer status for the purposes of this Act.[64]

4. Commerce.—"Commerce" encompasses both *interstate* trade, traffic, commerce or transportation and *intrastate* activities af-

58. In contrast to an express warranty under the U.C.C., an affirmation that guarantees satisfactory performance for an *unspecified* period of time would not constitute a written warranty under the Act. 16 C.F.R. § 700.3(a) (1977).

59. Rather than merely adopting the indefinite U.C.C. standard for determining "basis of the bargain," the FTC provides a new interpretation: to form the basis of the bargain a warranty must be conveyed at the time of sale without additional charge for the warranty benefit. *Id.* §700.11(b). "Puffing" and statements of general policy, however, remain exempt. *Id.* § 700.5(a).

60. Even though the Act does not cover realty, any personalty attached to realty may constitute a "consumer product." Thus, air conditioners, furnaces, and water heaters are covered. *Id.* § 700.1(c). Whether state laws classify such items as fixtures is irrelevant. *Id.* §700.1(d).

61. *Id.* § 700.1(a). Neither urethane foam products nor roof coating materials would satisfy the statutory definition of a "consumer product." *See* Jameson Chem. Co. Ltd. v. Love, __ Ind. App. __, 403 N.E.2d 928 (1980).

62. Essentially, the FTC specifically excludes products purchased exclusively for commercial or industrial uses from this definition. 16 C.F.R. §§ 701.1(b), 702.1(b) (1977).

63. In order to be a "consumer," a transferee must receive the warranted product during the duration of any implied or written warranty applicable to the product. 15 U.S.C. § 2301(3) (1976).

64. R. MILLER & D. TORTORICE, THE MAGNUSON-MOSS WARRANTY ACT 151 (1979).

fecting interstate commerce under section 2301(14). As explained by the United States Supreme Court in *United States v. American Building Maintenance Industries,*[65] this term is defined more broadly in Magnuson-Moss than when cited in other federal legislation.[66] According to the Court, Congress deliberately defined "commerce" broadly to make the FTC's jurisdiction under the warranty law coextensive with the constitutional power of Congress under the Commerce Clause.

B. Warranty Disclosure Requirements

Since legislators consider disclosure to be a panacea for consumer misunderstanding and deception, the Act mandates full and clear disclosure of written warranty terms.[67] Section 2301(b) authorizes the FTC to regulate disclosure. Consequently, two FTC-promulgated rules currently delineate the requisite disclosure by sellers for products costing consumers more than fifteen dollars. One rule requires that specified types of information be included in a disclosure document; the other, that sellers make the text of any written warranty available to buyers prior to sale.[68]

Specifically, in the first rule, which requires that language used in warranties be simple and readily understood, the FTC prescribes disclosure of the following information: first, the parties to whom the warranty is extended, if enforceability is limited to the original consumer purchaser or otherwise; second, which parts or properties are covered and excluded by the warranty; third, what the warrantor will and will not do in the event of a defect; fourth, the duration of the warranty and the date protection commences, particularly if the latter differs from the purchase date; fifth, a detailed explanation of the steps a consumer should follow to obtain warranty service; sixth, the availability of any informal dispute settlement mechanism; seventh, any durational limitation on implied warranties; eighth, any exclusion or limitation of incidental or consequential damages; and last, statements indicating that state laws may both nullify such limitations or exclusions and grant the purchaser additional rights.[69]

The second rule forces sellers and warrantors to make the text of written warranties available to buyers prior to sale. Any of the following four methods of displaying the warranty will generally satisfy a seller's duties under this rule: conspicuously displaying the

65. 422 U.S. 271 (1975).
66. *Id.* at 277 n.6.
67. *See* 15 U.S.C. § 2302(a) (1976).
68. 16 C.F.R. §§ 701.3(a) & 702.3 (1977).
69. Furthermore, when a warrantor utilizes owner registration cards, return of which is or reasonably appears to be a condition precedent to warranty coverage, the effect of noncompliance must be disclosed in the document. *Id.* § 701.4 (1977).

text of the warranty near the warranted product, advertising the presence of and maintaining indexed binders that contain copies of the warranty in each department where the product is sold, clearly displaying the package if the warranty is printed on it, and placing notices containing warranty language near the warranted product.[70]

C. *Warranty Designation and Attendant Standards*

In order to foster consumer awareness, section 2303 requires that all written warranties for consumer products costing more than ten dollars be conspicuously labelled either "full" or "limited." "Full" warranties must meet the section 2304 minimum federal standards, which are fourfold. First, a warrantor must remedy any defect in or nonconformity of the product with the written warranty within a reasonable time and without charge. Second, no durational limit may be imposed on implied warranties. Third, any limitation of consequential damages for breach of written or implied warranties must be conspicuous. Last, after a reasonable number of unsuccessful attempts to remedy malfunctions, the "full" warrantor must permit the customer to elect either a refund for or a replacement of the "lemon." Unless a warrantor can demonstrate the reasonableness of imposing additional duties, a consumer need only notify the seller of a defect. Written warranties that fail to meet any of these minimum standards must be denominated as "limited."[71]

D. *Disclaimers of Implied Warranties*

Section 2308(b) permits a supplier to disclaim or limit an implied warranty in only one, specified instance. Notably, a "limited" warrantor may abbreviate implied warranties to expire with an express warranty of reasonable duration. To be valid, however, the limitation must be conscionable, set forth in clear and unmistakable language, and displayed prominently on the face of the warranty. When a product is covered by both "full" and "limited" warranties, this limitation may not be made.[72] Any attempted limitation of an implied warranty in violation of this section becomes ineffective under both the Act and state law.[73]

---

70. This rule also prohibits sellers from obscuring or removing warranty disclosure materials unless such removal is necessary for store window displays, fashion shows or picture taking. *Id.* § 702.3(a)(2).

71. 15 U.S.C. § 2303(a)(2) (1976).

72. R. MILLER & D. TORTORICE, *supra* note 64, at 154 (1979).

73. 15 U.S.C. § 2308(c) (1976).

E. Remedies

1. Informal Settlement.—According to the Act, congressional policy encourages the establishment of informal settlement mechanisms for resolving consumer complaints fairly and expeditiously.[74] A warrantor who requires that consumers resort to the informal procedure before commencing suit could effectively preclude customers who refuse to seek informal remedy from suing under the Act.[75]

When a warrantor voluntarily chooses to establish the informal settlement mechanism, FTC regulations control.[76] Recently, the FTC promulgated regulations detailing six basic duties of warrantors offering such devices.[77] First, warrantors must inform consumers about the availability of, and the procedures for, utilizing the mechanism both in the warranty and at the time of dispute. Second, warrantors must explain to the consumer that although he may need to utilize the informal mechanism before pursuing judicial remedy under the Magnuson-Moss Act, he may still seek relief under state commercial laws if he does not desire an informal resolution of the dispute.[78] Third, warrantors must provide addresses necessary for obtaining informal aid, descriptions of the mechanism, and notice of applicable time limits. Fourth, when warrantors receive complaints directly, these guarantors of performance must notify consumers of their intentions within a reasonable time. Fifth, warrantors must respond promptly to requests for relevant information. Last, warrantors must abide by the informal dispute settlement mechanism in good faith.[79]

In addition to formulating rules for warrantors, the FTC determined minimum requirements for the mechanism itself.[80] Not only should the mechanism be adequately funded and competently staffed, but it must also be available to consumers without post-sale charge. Furthermore, no member of the mechanism may have direct involvement with the warrantor. Additional regulations prescribe certain operational and recordkeeping duties.

2. Judicial Enforcement of the Act

(a) Private remedies.—After giving a warrantor a reasonable opportunity to cure his failure to comply with the Act, a dissatisfied

74. *Id.* § 2310(a)(1).
75. *Id.* § 2310(a)(3)(C). Alternatively, if a consumer resorts to the informal remedy, any decision rendered by the mechanism becomes admissible into evidence in court. *Id.*
76. *Id.* § 2310(a)(2).
77. 16 C.F.R. § 703.2 (1977).
78. *See* § II *supra.*
79. 16 C.F.R. § 703.2 (1977).
80. *Id.* §§ 703.3-703.8.

consumer may bring a civil suit under the Act for "damages and other legal and equitable relief."[81] If the consumer ultimately prevails, he can receive costs, expenses, and attorneys fees in addition to damages.[82] While such suit may be brought in either state or federal court, the opportunity to litigate in the federal forum requires a minimum amount in controversy of $50,000.[83] Furthermore, as a prerequisite to bringing a class action in the federal courts, at least 100 plaintiffs must be named and no individual claim can be less than twenty-five dollars.[84] Presumably, Congress imposed these jurisdictional limits to prevent trivial or insignificant class actions.[85]

(b) Public remedies. —Since noncompliance with any provision in Title I of the Act also constitutes a violation of Title II[86] either the Attorney General or the FTC may sue in federal district court to restrain further nonconformity, regardless of the jurisdictional amount.[87] Alternatively, the FTC may issue cease and desist orders against warrantors found violating the Act. Some commentators who interpret the term "Attorney General" in section 2310 as describing a state official[88] deem the remedy provision banal. At least one court, however, has stressed the novelty of this provision. In *In re General Motors Corporation Engine Interchange Litigation,*[89] the Seventh Circuit Court of Appeals determined that the United States Attorney, rather than his counterpart at the state level, should enjoin violations of the Act.

F. Preemption of State Law

By not specifically supplanting state or federal law, the Act generally complements existing consumer rights. State laws affecting liability for personal injury and consequential property damages, for example, remain applicable.[90] Preemption occurs, however, when state statutes covering warranty labeling or disclosure attempt to reg-

81. 15 U.S.C. § 2310(d)(1) (1976).

82. *Id.* § 2310(d)(2). Presumably, since the Act permits an award of attorneys fees based on actual time expended, a court would need to receive evidence of the attorney's time expended before making an award. *See* Jameson Chem. Co. Ltd. v. Love, __ Ind. App. __, 401 N.E.2d 41 (1980), *modified,* __ Ind. App. __, 403 N.E.2d 928 (1980). *See generally* Berger, *Court Awarded Attorneys' Fees: "What Is Reasonable,?"* 126 U. PA. L. REV. 281 (1977).

83. 15 U.S.C. § 2310(d)(3) (1976).

84. *Id.*

85. *See In re* General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1114 n.2 (7th Cir. 1979), *cert. denied,* 444 U.S. 870 (1979).

86. 15 U.S.C. § 2310(b) (1976).

87. *Id.* § 2310(c)(1).

88. *See* Comment, *Consumer Warranty Law in California Under the Commercial Code and the Song-Beverly and Magnuson-Moss Warranty Acts,* 26 U.C.L.A. L. REV. 583, 674 (1979).

89. 594 F.2d 1106, 1127-28 n.33 (7th Cir. 1979), *cert. denied,* 444 U.S. 870 (1979).

90. 15 U.S.C. § 2311(b)(2) (1976).

ulate the same area as the Act's disclosure designation.[91] Nevertheless, if the FTC determines that such state statutes offer consumers greater protection than the federal enactment, without burdening interstate commerce, no preemption results.

G. *Effective Date*

Section 2312 stresses that the Act affects only consumer products manufactured prior to six months after the date of enactment. The FTC subsequently clarified[92] the effective date by regulation: the Act covers those consumer products manufactured after July 4, 1975.[93]

VI. The Failure of the Act in the Automobile Industry

By promoting full disclosure of warranty terms, detailing minimum requirements for "full" warranties, encouraging the establishment of informal dispute settlement mechanisms, and attempting to lessen the financial burden of instituting suit, the Magnuson-Moss Warranty Act generally protects consumers. For example, only seven percent of all warranted products are currently delivered with defects.[94] Manufacturers correct eighty-six percent of these defects within a month, leaving ninety-two percent of the customers concerned satisfied.[95] Moreover, competition between manufacturers has increased the number of home appliances covered by "full" Magnuson-Moss warranties.[96]

Notwithstanding its overall effectiveness, the Act has failed dismally in the automobile industry, largely because each of the "Big Three" automobile manufacturers offers "limited" rather than "full" warranties on its products.[97] In particular, the combination of few mandatory requirements on automobile manufacturers and an excessive reliance on warrantors voluntary performance emasculates the efficacy of the Act. Exacerbating these statutory deficiencies, the automobile industry currently suffers from both a shortage of trained mechanics and the existence of disparate wage scales for warranty repairs.

---

91. *Id.* § 2311(c)(1).

92. Some courts have apparently misconstrued the effective date of the Act. For example, by noting that the Act would not apply to consumer products manufactured before January 4, 1975, the New Jersey Supreme Court implied that the Act would cover articles manufactured after that date. *See* Herbstman v. Eastman Kodak Co., 68 N.J. 1, 342 A.2d 181 (1975).

93. 16 C.F.R. § 700.2 (1977). When a consumer seeks repair of a consumer product, the manufacture date of any replacement parts determine coverage.

94. *See* note 12 and accompanying text *supra.*

95. STAFF OF HOUSE COMM., *supra* note 12, at 30.

96. *See* note 5 and accompanying text *supra.*

97. *See* notes 6-7 and accompanying text *supra.*

A. *Deficiencies of the Act*

1. "Full" versus "Limited."—The Act's failure to require any proffer of "full" warranties is a major deficiency, particularly with respect to the automobile industry. By relying solely on the pressures of a capitalist marketplace, the Act ignores the potential for the universal offering of inferior warranties in industries dominated by few manufacturers. For example, competition between automobile warrantors with respect to warranties is negligible, since ninety-eight percent of all automobiles are currently sold with only "limited" warranties.[98] Automobile purchasers, therefore, enjoy none of the substantial rights afforded by "full" warranties.[99] Moreover, because any implied warranties will probably be severely limited in duration, automobile purchasers appear particularly vulnerable. Emphasizing the impact of this problem, consumers are increasingly spending larger percentages of their total income on automobiles.[100]

Both the facts and resolution of *Ford Motor Company v. Mayes*[101] illustrate this flaw in the Act. On February 25, 1976, the plaintiff Mayes purchased a new 1976 Ford pickup truck from an authorized dealer. Five weeks later, after noticing an unusual noise and vibrations in the rear of the truck, the plaintiff returned the truck to the dealer. Even though the dealer replaced the clutch, the noise persisted. Plaintiff Mayes subsequently returned the truck for repair eight times but to no avail. Eventually, a frame repair shop determined that the truck's frame had twisted and diamonded. Evidence later presented at trial established that such twisting and diamonding could cause excessive wear and tear. On August 26, 1976, the plaintiff finally returned the truck to the dealer with written notice of revocation of acceptance.[102] The Ford Motor Company refused to repurchase or replace the truck, claiming that its liability was circumscribed by a "limited" warranty.[103] In the suit that followed, the

98. *See* note 8 and accompanying text *supra.*

99. *See* § III C *supra.*

100. *See* note 9 and accompanying text *supra.*

101. 575 S.W.2d 480 (Ky. 1978).

102. For an examination of the effect of revocation under the U.C.C., see notes 33-36 and accompanying text *supra.*

103. The warranty accompanying the sale of the truck provided as follows:

> LIMITED WARRANTY 1976 NEW CAR AND LIGHT TRUCK Ford warrants for 1976 model cars and light trucks sold by Ford that the Selling Dealer will repair or replace free any parts, except tires, found under normal use in the U.S. or Canada to be defective in factory materials or workmanship within the earliest of 12 months or 12,000 miles from either first use or retail delivery. THERE IS NO OTHER EXPRESS WARRANTY ON THIS VEHICLE. ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS IS LIMITED TO THE 12 MONTH/12,000 MILE DURATION OF THIS WRITTEN WARRANTY. NEITHER FORD NOR ANY OF ITS DEALERS SHALL HAVE ANY RESPONSIBILITY FOR LOSS OF USE OF THE VEHICLE, LOSS OF TIME, INCONVENIENCE, COMMERCIAL LOSS OR CONSEQUENTIAL DAMAGES.

Mayes court agreed that no revocation could occur under the Act, since the warranty was clearly designated as "limited." Notably, to resolve the dispute the court necessarily examined the alternative claims based on the U.C.C. and the state's consumer protection code.[104]

2. Remedies.—The remedy section of the Act offers little protection to consumers. Case law and statistics emphasize four statutory deficiencies. First, even though the Act provides that counsel fees may be awarded to a successful litigant,[105] most attorneys and their clients prefer not to rely upon such speculative awards. Specifically, in April of 1977, the staff of the FTC's Bureau of Consumer Protection contacted twenty-one attorneys who had begun to sue automobile companies under the Act. Most of those contacted indicated that the discretionary nature of fee recovery encouraged attorneys either to refuse warranty cases altogether or to press for pretrial settlement.[106]

Second, by mandating that 100 plaintiffs be explicitly named in a class action,[107] the Act disregards the reality of an automotive society. Searching for the requisite number of suitable plaintiffs before discovery commences may necessitate a laborious, nationwide effort. During this investigation an attorney could face a statute of limitations problem or admonition for engaging in the prohibited act of solicitation.[108] Unfortunately, this statutory requirement proved dispositive in *Barr v. General Motors Corporation.*[109] After discovering discoloration and chipping of paint on her new automobile, plaintiff Barr brought a class action on behalf of herself and all other purchasers of 1977 Chevrolet automobiles which were defectively painted. Despite assuming that the aggregate of individual claims in excess of $25 would probably reach the $50,000 minimum jurisdictional amount, the court dismissed the case because 100 plaintiffs had not been named in the complaint. Neither the plaintiff's information and belief that the class actually encompassed several thousand persons nor the possibility of subsequent identification persuaded the court to certify the class.

Third, inconsistent decisions have resulted from the Act's neglecting to specify whether punitive damages may be awarded to a

---

Ford Motor Co. v. Mayes, 575 S.W.2d 480, 483 (Ky. 1978).

104. Notably, the court did grant relief under the state commercial and consumer protection laws.

105. *See* notes 81-82 and accompanying text *supra.*

106. STAFF OF HOUSE COMM., *supra* note 12, at 34.

107. *See* note 84 and accompanying text *supra.*

108. STAFF OF HOUSE COMM., *supra* note 12, at 34.

109. 80 F.R.D. 136 (S.D. Ohio 1978). *See also* Watts v. Volkswagen Artiengesellschaft [sic], 488 F. Supp. 1233 (W.D. Ar. 1980); Barnette v. Chrysler Corp., 434 F. Supp. 1167 (D. Neb. 1977).

successful litigant. For example, a federal district court in *Novosel v. Northway Motor Car Corporation*[110] held that punitive damages were not recoverable under the Act. Looking to the U.C.C. for guidance, the court found that commercial laws only allow compensatory damages for breach of warranty. Thus, the court held that punitive damages were not available under the Act. In juxtaposition to the *Novosel* holding, the Seventh Circuit Court of Appeals opined in *In re General Motors Corporation Engine Interchange Litigation*[111] that punitive damages might be recoverable. Justifying their disagreement with the court in *Novosel,* the court noted that the Act broadly provides for damages and other legal and equitable relief.

Last, the laudable informal dispute settlement mechanisms envisioned by the Act remain virtually nonexistent. Since the Act merely encourages but fails to require the establishment of such schemes, very few have been created by automobile manufacturers. Currently, the Ford Motor Company operates three complaint-resolution boards, while General Motors sponsors two.[112] This failure to establish settlement mechanisms appears particularly harmful in light of the achievements of independently-organized mechanisms.[113]

B. The Intricacies of the Automobile Industry

Intricacies of the automobile industry magnify the weaknesses apparent in the Act, engendering a warranty crisis. Recent statistical compilations evaluating automobile warranty performance unequivocally demonstrate the existence of such a crisis. For example, nearly thirty percent of all new motor vehicles delivered contain defects. Forty percent of these defects require repeated visits to dealers, while thirty percent take longer than a month to correct. Accordingly, fifty-seven and one-half percent of all automobile-related complaints concern vehicles still under warranty.[114]

Poor vehicle design and incompetent repair service appear partially responsible for the crisis. According to National Highway Traffic and Safety Administration (NHTSA) estimates, consumers lose $2 billion annually because of poor vehicle design.[115] Allegedly, designers frequently produce styles that require nonstandard parts or excessively difficult repair techniques.[116] Concurrently, the NHTSA

110. 460 F. Supp. 541, 545 (N.D.N.Y. 1978).

111. 594 F.2d 1106, 1132-33 n.44 (7th Cir. 1979), *cert. denied,* 444 U.S. 870 (1979).

112. STAFF OF HOUSE COMM., *supra* note 12, at 26-27.

113. Forty-four AUTOCAP programs, developed by the National Automobile Dealers Association report a satisfactory resolution rate of 65 to 70%. *Id.*

114. *Id.* at 29.

115. *Id.* at 35.

116. *Id.* at 35-36. For example, in order to remove the transmission on some Ford Pintos, a mechanic must remove the gear shift and handle. Preliminarily, he spends an estimated two

submits that incompetent or unnecessary repairs constitute $20 billion of the $50 billion annual expenditures for auto repair and maintenance.[117] Rather than fraud, over-frequent preventive maintenance and a general inability of auto mechanics to diagnose defects properly account for this loss.[118] This conclusion clearly comports with the National Institute for Automotive Service Excellence's (NIASE) postulation that only fifty percent of all practicing mechanics could pass the NIASE mechanic certification test.[119]

Exacerbating this basic problem of incompetence, the disparate rates paid by manufacturers for warranty work create a substantial disincentive for providing adequate warranty service. Basically, the hourly labor rate multiplied by a warranty flatrate time determines a mechanic's pay.[120] Since the flatrate time specified for warranty repairs is generally lower than that listed for retail repairs, a mechanic receives substantially less remuneration for warranty work. Similarly, dealers receive less reimbursement for parts provided on warranty repairs than for those sold for retail repair services. Moreover, when conscientious dealers choose to honor warranties, a severe shortage of replacement parts limits their efforts. While the Ford Motor Company has recently established twenty-one parts warehouses across the country,[121] a spokesman for the company concedes that the problem cannot be rectified so easily: "While Ford continues to seek systems improvements, parts availability problems will never be completely eliminated because of the great diversity and volumes of parts required to service the millions of Ford products on the road."[122]

V. Possibilities for Rectifying the Automobile Warranty Crisis

A. Proposed Amendments to the Magnuson-Moss Warranty Act

In an attempt to rectify the present warranty crisis, Senator Metzenbaum and Congressman Eckhardt recently sponsored companion bills to amend the Magnuson-Moss Warranty Act as it applies to automobile warranties.[123] On August 3, 1979, before introducing this proposed legislation, Senator Metzenbaum explained:

> I am today introducing the Automobile Full Warranty Act of 1979, legislation designed to help eliminate one major source of consumer complaint—poor automobile warranty performance.

---

to three hours removing seats, console, and floor covering before he can reach the gear shift and handle. *Id.*

117. *Id.* at 11.
118. *Id.* at 14.
119. *Id.*
120. *Id.* at 31.
121. *Id.*
122. *Id.*
123. S. 1701, 96th Cong., 1st Sess. (1979); H.R. 1005, 96th Cong., 1st Sess. (1979).

. . . .

> Today, the consumer faces one chance in three that his or her new car will be delivered with a defect or problem. But under current automobile warranty systems, these owners can expect little relief. Not only must they bear the inconvenience and frustration involved in having defective vehicles repaired, but in many instances, they are forced to take time off from work to pay for alternate transportation while their new car is in the shop.
>
> Automobile warranty systems work against the consumer. Too often they offer empty promises to the new car buyer. . . .
>
> . . . .
>
> Unfortunately, with respect to automobiles, warranty performance has not improved as much as many of us had hoped, largely because the Big Three auto manufacturers have chosen to offer limited rather than full warranties on their products.[124]

While provisions of the two bills appear startlingly similar, vital differences exist. Essentially, the amendments proposed by the house bill seem less comprehensive. Enactment of either bill, however, would substantially benefit automobile purchasers.

l. Senate Bill 1701—In its current form, Senate Bill 1701 envisions three basic amendments to the Magnuson-Moss Warranty Act. First, the Act's definitional section would be expanded to accommodate additional terms. Second, section 2304 minimum federal warranty standards would apply to any written warranties for passenger motor vehicles. Last, existing statutory remedies would become revitalized.

(a) Definitional additions.—Section 2301 of the Act would add two new terms, "passenger motor vehicle" and "warranty dispute resolution system." "Passenger motor vehicle" is defined as an automotive vehicle, designed for carrying twelve or fewer persons.[125] "Warranty dispute resolution system" or "system" would embrace any informal dispute settlement mechanism, including any combination of arbitration, mediation, and conciliation procedures available for resolving consumer warranty disputes.

(b) Mandatory provision of "full" warranties.—Significantly, the Senate amendments would make the section 2304 provisions applicable to all written warranties on passenger motor vehicles. These amendments would prevent any further issuance of "limited" automobile warranties. Automobile purchasers receiving written warranties would enjoy the following rights: to have defects cured by manufacturers within a reasonable time and without charge; to re-

124. 125 CONG. REC. S.11691 (daily ed. Aug. 3, 1979) (remarks of Sen. Metzenbaum).

125. The definition excludes motorcycles and passenger-carrying trucks. *See* S.1701, 96th Cong., 1st Sess. § 105(b)(16) (1979).

ceive implied warranties of unlimited duration; to be entitled to consequential damages for breach of written or implied warranties, unless an exclusion or limitation conspicuously appears on the face of the warranty; and to elect either refund for or replacement of the product without additional charge, if the defect remains irreparable after a reasonable number of attempts to remedy malfunctions have been made by the warrantor. If an automobile manufacturer were to offer no written warranty, however, this mandate would not apply.

(c) Remedies.—The four changes proposed for section 2310 should dramatically increase the efficacy of existing remedies. First, each manufacturer or importer of new passenger motor vehicles would be required to offer comprehensive warranty dispute resolution systems to consumers before January 1, 1982. For impartiality and accessibility, the systems would operate under FTC guidelines. Basically, the amendments would require that warrantors inform consumers publicly of the system's availability for resolving legal and factual disputes. Should consumers elect to submit their disputes, they would not be bound by decisions unless they wished to be. Decisions would automatically bind automobile manufacturers, however, and would become admissible in subsequent proceedings.

Second, the bill would amend section 2310(d) of the Act to make an award of attorneys fees to successful litigants mandatory. No longer could courts exercise discretion in awarding fees. Third, federal courts would enjoy jurisdiction over class actions if the defendant merely stipulated that the proposed class consisted of at least 100 plaintiffs. Moreover, unless a reasonable opportunity to conduct pertinent discovery had been provided, no court could dismiss an action commenced in federal court for lack of named plaintiffs. Last, during the pendency of any suit brought under the Act, the consumer would be entitled to retain possession and use of the motor vehicle.

2. House Bill 1005.—House bill 1005 demonstrates great similarity to the Senate proposal. Basically, three features coincide with the Senate bill: "full" designation becomes mandatory when a written warranty is provided, counsel fees must be awarded to successful litigants, and owners may retain their vehicles during the pendency of proceedings. Because minor differences exist, however, the House bill appears to be weaker. While the House proposal offers all automobile purchasers broad remedies under section 2304, the bill would nevertheless allow "full" warrantors to limit the duration of implied warranties. Furthermore, the bill makes no provision for establishing informal dispute settlement mechanisms. Since these informal

devices would probably provide speedy, inexpensive resolutions, their absence enervates the bill somewhat.

B. Concomitant Remedies Needed Under the U.C.C.

Even if Congress amends the Magnuson-Moss Warranty Act, equivalent forms of relief under each state's commercial code would still be needed by aggrieved automobile purchasers. Clearly, the potential for automobile warrantors to avoid all liability under Magnuson-Moss by neglecting to provide any sort of written warranty would remain. Moreover, a purchaser choosing not to avail himself of an informal dispute settlement mechanism could resort to U.C.C. remedies. If the Magnuson-Moss Warranty Act is not suitably amended, consumers will require strong protection from commercial laws.

Unfortunately, buyers attempting to utilize U.C.C. remedies currently encounter two major hurdles. First, a written warranty may state that it provides an exclusive remedy. If this provision is deemed controlling, a purchaser will be foreclosed from resorting to any other remedy. Second, the warranty may also exclude or limit recovery of consequential damages.[126] Judicial clarification appears necessary for adequate resolution of either situation.

1. The Exclusive Remedy.—Any consumer seeking remedies other than those specifically provided in a written warranty will attempt to invoke subsection 2-719(2) of the U.C.C. This subsection permits an aggrieved party to resort to all U.C.C. remedies when circumstances cause an exclusive or a limited remedy to fail of its essential purpose. Determining precisely when such a failure occurs, however, may prove extremely difficult.[127]

An emerging judicial trend that equates failure of essential purpose of a remedy with deprivation of the substantial basis of the bargain increasingly permits aggrieved buyers to revoke acceptance and recover damages. Such courts seek guidance from the "unenacted,"[128] official commentary to section 2-719, which provides in pertinent part: "[U]nder subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of the Article."[129] The court in *Ford Motor Company v. Mayes*[130] deter-

126. *See* note 103 and accompanying text *supra.*
127. *See generally* Anderson, *Failure of Essential Purpose and Essential Failure of Purpose: A Look at Section 2-719 of the Uniform Commercial Code,* 31 S.W.L.J. 759 (1977).
128. J. WHITE & R. SUMMERS, *supra* note 16, at 11.
129. U.C.C. § 2-719, Comment 1.
130. 575 S.W.2d 480 (Ky. 1978).

mined that defects in the truck had substantially impaired its value to the buyer, causing the limited remedy under the warranty of merely repair and replacement of parts, to fail of its essential purpose. Only as long as courts uniformly construe section 2-719(2), in this manner, may buyers be spared harsh results.

2. Consequential Damages.—Neither case law nor U.C.C. commentary determines how an exclusive remedy's failure of essential purpose affects the availability of consequential damages. By providing that a remedy's failure of its essential purpose entitles a purchaser to resort to an Article 2 remedy, subsection 2-719(2) implies that a successful litigant could even receive consequential damages. Conversely, subsection 2-719(3) proposes that an unconscionability standard alone determines recovery of consequential damages.

Although courts and commentators have not reconciled these seemingly discordant provisions, two writers have recently presented a satisfactory solution with three distinct standards.[131] First, whenever an exclusion operates to cause a remedy to fail of its essential purpose, consequential damages should be allowed. In support of this view, U.C.C. draftsmanship fails to preclude it and any outcome would comport with good policy. Second, where parties have agreed to a limited or an exclusive remedy, only consequential damages resulting from the seller's failure to provide that remedy should be awarded. Last, whenever an exclusion proves unconscionable, regardless of failure of essential purpose, consequential damages should be awarded.

V. Conclusion

Both state commercial laws and the federal Magunson-Moss Warranty Act fail to protect automobile purchasers adequately. By generally permitting warrantors to disclaim liability and to limit remedies available to consumers, these enactments significantly weaken the position of buyers. Because weak existing legislation has engendered an automobile warranty crisis, expeditious resolution is required.

Basically, revision of the Magnuson-Moss Warranty Act in conjunction with judicial clarification of the U.C.C. section 2-719 could provide consumers with the requisite panacea. In particular, adoption of Senate Bill 1701, with its myriad of provisions rectifying original oversights in draftsmanship, should better protect consumers. Concomitant judicial clarification of U.C.C. section 2-719 should

131. Roberts & Mann, *Magnuson-Moss Federal Warranty Act and Uniform Commercial Code Section 2-719: Further Reflections and Recent Developments,* 1979 ARIZ. ST. L.J. 765.

sufficiently protect those consumers not embraced within the ambit of the Magnuson-Moss Act.